

San Diego Law Review

Volume 27

Issue 4 *Immigration and Nationality XV and
Pacific Rim Symposiums*

Article 4

11-1-1999

United States Immigration Planning for Cross-Border Mergers and Acquisitions

Charles M. Miller

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>



Part of the [Immigration Law Commons](#)

Recommended Citation

Charles M. Miller, *United States Immigration Planning for Cross-Border Mergers and Acquisitions*, 27 SAN DIEGO L. REV. 831 (1990).

Available at: <https://digital.sandiego.edu/sdlr/vol27/iss4/4>

This Immigration and Nationality XV is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

United States Immigration Planning For Cross-Border Mergers And Acquisitions

CHARLES M. MILLER*

Recent business journal reports have provided details of the Japanese acquisition of prime United States companies and trophy real estate holdings. Figuring prominently in these reports was Matsushita Electric's purchase of MCA for more than \$6.5 billion;¹ Sony's expenditure of \$3.478 billion to purchase Columbia Pictures Entertainment Company; and the Mitsubishi Estate Company's \$846 million purchase of 51 percent of the company that owns Rockefeller Center, the Manhattan landmark comprised of nineteen buildings.² The latest available statistics dwarf even these staggering price tags: Japanese foreign direct investment in the United States (FIDUS) increased in 1988 by 40 percent to \$47 billion.³

Despite the 1988 jump in Japanese investment belies, they still trail the British in total United States direct investment. A study of the largest foreign acquisitions in the United States during the last decade demonstrates that the Europeans and Canadians have also been willing to spend billions to acquire interests in such "American" companies as Standard Oil (British Petroleum, U.K., 45 percent, \$7.6 billion), Pillsbury (Grand Metropolitan, U.K., \$5.7 bil-

* Charles M. Miller practices immigration law in Studio City, California. Mr. Miller served as an attorney for the United States Immigration and Naturalization Service and as the Chair of the Immigration Specialty, Board of Legal Specialization of the State Bar of California.

1. Cieply & Citron, *MCA Board Approves Key Terms of Buyout*, L.A. Times, Nov. 26, 1990, at A1.

2. *The Top 200 Deals*, Bus. Wk., Apr. 13, 1990, at 34; *Deals Too Late For 1989*, Bus. Wk., Apr. 13, 1990, at 60. In July, 1990, the Mitsubishi Estate Co. acquired an additional 6.6% of Rockefeller Center for \$110 million. *Mighty Mitsubishi Is On The Move*, Bus. Wk., Sept. 24, 1990, at 98.

3. Bartlett, *Japan's Achilles Heel*, L.A. Times, Nov. 12, 1989, at D3, col. 1.

lion), and Farmers Group (B.A.T., U.K., \$5.2 billion).⁴

The 1990s find the Japanese poised to increase direct investments further. Japan's inclination to increase its investments in the U.S. is fueled by operating profits of its corporations, as well as Japan's ability to borrow money in the international markets at favorable interest rates.⁵

The crucial question for this decade is not whether foreign direct investment in the United States will happen, but what form the cross-border merger or acquisition will take when it does happen. The Japanese have traditionally utilized the "green field" approach to their United States entities (that is, they create their own companies "from scratch" rather than acquiring existing companies). The Europeans and the Canadians have had no similar aversion to cross-border mergers and acquisitions utilizing hostile take-over devices and leveraged buyouts (LBO's). Such cross-border deals accounted for 37.8 percent of all 1989 United States takeovers.⁶

The United States' legal considerations of the prospective foreign direct investor not only involve the form of the investment, but also the future operation of the United States company after the acquisition is made. In turn, a key concern of the multinational company (MNC) is whether its crucial managers and high technology professionals can be quickly and legally transferred to work for the United States entity.

Foreign investors quickly learn that the transfer of foreign employees, as well as the employment of United States workers, subjects the company to the employer sanctions provisions of the Immigration Reform and Control Act of 1986 (IRCA).⁷ This employer sanctions law, with its system of graduated civil fines and criminal penalties for pattern and practice violations, has resulted in 26,356 INS investigations, 5,000 notices of violations, and \$15.5 million in fines, through September 30, 1989.⁸

Under this law it is unlawful for an employer to knowingly "hire, recruit or refer for a fee for employment" an alien who is not a lawful permanent resident, or who is not authorized to work. The statute mandates that the employer comply with a verification system within three business days of any new hire by examining the new em-

4. N. GLICKMAN & D. WOODWARD, *THE NEW COMPETITORS: HOW FOREIGN INVESTORS ARE CHANGING THE U.S. ECONOMY* 40 (1989).

5. Holden, *Japan Is Like A Kid In A Candy Store — A Rich Kid*, *BUS. WK.*, Dec. 4, 1989, at 50.

6. Farrell, *Where Will Merger Mania Strike Next*, *BUS. WK.*, Dec. 18, 1989, at 32.

7. Immigration and Nationality Act of 1952, § 274(a), Pub. L. No. 82-414 (codified as amended at 8 U.S.C. §§ 1101-1524) [hereinafter INA]; 8 C.F.R. §§ 274a.2(b)(1), 274a.10 (1990).

8. INA § 274A(a); 8 U.S.C. § 1324a(a) (1988). 8 C.F.R. § 274a.2(b)(1) (1990).

ployee's documentation of identity and legal right to work, and by completing an I-9 form.⁹

In the case of a corporate reorganization, merger, or sale of stock or assets, a successor employer who continues to employ the previous owner's work force has one of two choices under the Immigration and Naturalization Service ("INS") employer sanctions regulations. On the one hand, the new employer may elect to complete new I-9's for the work force and treat each employee as a new hire. On the other hand, the successor employer is not required to reverify an employee's employment eligibility if it is considered continuing employment.¹⁰ The successor employer in that case obtains the INS I-9 form for each continuing employee from the previous owner's employment records. If the successor employer obtains the I-9's of the existing work force completed by the seller, good legal advice to investor clients would be to obtain an indemnification agreement from the seller to guard against future liability for possible employer sanctions violations.

To facilitate the speedy staffing of the United States company as well as to avoid the IRCA sanctions, immigration attorneys are being consulted in the planning stage as an MNC considers a direct investment in the United States. Immigration issues may affect the MNC's choice of the form its United States investment will take. The choice of form may affect an MNC's ability to facilitate the employment of crucial workers in the United States.

This article will discuss certain nonimmigrant visa categories—the E, H, and L visas—under which an MNC may petition to obtain work authorization for its non-U.S. resident employees. Use of the nonimmigrant categories for these workers, rather than immigrant categories, is necessitated by both the administrative delays incumbent in the labor certification system and the immigrant visa petition and interview process. Unlike the person who is admitted for lawful permanent residence, the nonimmigrant may remain only for the duration of the authorized stay and enjoys employment authorization which is coextensive with the nonimmigrant status. Nonimmigrants participate in a "double check" immigration visa system: they must apply for a visa abroad at a U.S. consulate in order to travel to the United States, and they are inspected by the INS at the port of entry. Once admitted, their right to remain in the United States de-

9. 8 C.F.R. § 274a.2(b)(1)(viii)(G) (1990).

10. Cox, *In Court, The I.N.S. Trounces Employer*, 12 NAT'L L.J. Jan. 15, 1991, at 23.

pend upon their maintenance of the terms and conditions of the nonimmigrant status.

The Immigration Act of 1990,¹¹ signed by President Bush on November 29, 1990, will substantially change the immigration strategy of many foreign employers. The provisions of the new law which concern the nonimmigrant categories covered by this article become effective on October 1, 1991.¹² The 1990 Act creates special categories for employment-based immigrants¹³ and changes the requirements for some of the nonimmigrant categories.¹⁴ It also adds new nonimmigrant categories for temporary workers with "extraordinary ability in the sciences, arts, education, business or athletics" ("O-i" aliens), as well as a new "P" category for athletes, artists, and entertainers.¹⁵ It is clear that the nonimmigrant categories will be used by employers who wish expeditiously to bring temporary foreign workers for employment in the United States.

I. VISAS

A. E-1 and E-2 Visa Benefits for Companies from Treaty Countries

No other nonimmigrant status offers the depth and quality of immigration benefits to qualifying foreigners provided by the E-1 treaty trader and E-2 treaty investor visas.¹⁶ In order to qualify, the applicant's country of nationality must have a treaty or agreement with the United States that provides reciprocal visa rights for U.S. citizens.¹⁷ Most of these agreements are considered treaties of friend-

11. P.L. 101-649, Nov. 29, 1990, 104 Stat. 4978 [hereinafter "1990 Act"].

12. *Id.* at § 161(a).

13. *Id.* at § 121.

14. *Id.* at § 204-06.

15. *Id.* § 207(a) (3) (creating INA § 101(a)(15)(O) & ¶; to be codified at 8 U.S.C. §§ 1101(a)(15)(O), ¶).

16. INA § 101(a)(15)(E); 8 U.S.C. § 1101(a)(15)(E) (1988).

17. U.S. DEPT. OF STATE, VISA BULLETIN Vol. VI No. 30, Jan. 1990 (*reported in* 66 INTERPRETER RELEASES 18, Appendix III (Jan. 1, 1990)) provides the following list of E-1 Treaty Trader/E-2 Investor Countries. Treaty countries marked with the symbol (†) have only E-1 treaty trader provisions. Treaty countries marked with the symbol (††) have only E-2 treaty investor provisions. Other listed countries have FCN Orbit treaties that contain both E-1 and E-2 provisions.

Argentina France Norway

Australia††** Germany (FRG) Oman

Austria Greece† Pakistan

Bangladesh†† Grenada†† Paraguay

Belgium Honduras Philippines

Bolivia† Iran Spain

Brunei† Ireland† Suriname

Cameroon†† Israel† Sweden††**

Canada††* Italy Switzerland

China (Taiwan) Japan Thailand

Columbia Korea Togo

ship, commerce, and navigation (F.C.N.) by the Department of State. The United States also accords treaty alien status to citizens of countries with a bilateral investment treaty (B.I.T.).¹⁸

These two visa categories are attractive to eligible companies because applications for these visas may be made directly either to a consular officer abroad or to the INS within the United States. This process avoids both the need for a Department of Labor alien labor certification and the delays incumbent in the immigrant preference system.

The foreign person is classifiable as an E-1 nonimmigrant treaty trader if he or she will be in the United States "solely to carry on substantial international trade, including trade in services or trade in technology, principally between the United States" and the treaty country.¹⁹ In practice, the applicant for treaty trader status must show that trade contracts exist and that at least one-half of the trade is between his or her country of nationality and the United States. The INS defines trade as the exchange, purchase, or sale of goods and/or services. Goods, according to the INS definition, are

Costa Rica Latvia† Turkey†
Denmark† Liberia United Kingdom
Estonia† Luxembourg Yugoslavia
Ethiopia Netherlands Zaire††
Finland†

* The United States-Canada Free Trade Agreement (FTA) became effective January 1, 1989. 54 Fed. Reg. 488, 593 (1988); INA § 214(e), 8 U.S.C. § 1184(e) (1988); 8 C.F.R. §§ 214.2(b)(1), (4); 8 C.F.R. § 214.6 (1990). The FTA substantially affected bilateral trade activities between the two countries. It also significantly affected the law for Canadian nonimmigrants to the U.S. including the availability of the E-1 and E-2 visas. 8 C.F.R. § 214.2(b)(4) expands the role of the Canadian business visitor in the United States who receives no salary or remuneration from a U.S. source other than expenses. Canadian L-1's have expedited adjudication procedures at the port of entry. 8 C.F.R. § 214.2(l)(17). The FTA also provides for "TC" status for professional Canadians. 8 C.F.R. § 214.6 (e). The TC classification has been compared to the H-1B without a six year cap. *See* 8 C.F.R. § 214.6(d)(2)(ii) for a list of the acceptable professions.

** The 1990 Act treats these countries as coming under INA § 101(a)(15)(e) despite the absence of an FCN treaty.

18. The 1990 Act designated but did not name two countries without bilateral treaties with the United States whose nationals may still qualify for E status. 1990 Act, *supra* note 11, at § 204(b). The two countries are Sweden and Australia. Immigration Law Report (Clark Boardman), Vol. 9 No. 11, 132 (Dec. 1990). Implementation is contingent upon the foreign states' granting of reciprocal nonimmigration status to U.S. citizens.

19. INA § 101(a)(15)(E)(i); 8 U.S.C. § 1101(a)(15)(E)(i) (1988), as amended by the 1990 Act, *supra* note 11. What constitutes 'substantial' for purposes of trade and investment is to be established by the Secretary of State. 1990 Act at § 204(c)(45).

tangible commodities or merchandise having intrinsic value, while services are economic activities with outputs other than tangible goods. The agency has recognized that "service activities include, but are not limited to, banking, insurance, transportation, communications and data processing, advertising, accounting, design and engineering, management consulting, tourism and technology transfer."²⁰

A person is classifiable as an E-2 nonimmigrant treaty investor if he or she "has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living."²¹ The statute provides a basic framework of requirements that defines the treaty investor classification. Regulations and policy promulgated by both the State Department and the INS also affect the preparation of a case for either of the E classification.²²

The statute provides that the spouse and minor children of the alien, regardless of their nationality, may apply to accompany or to join the principal alien in the United States. Moreover, E visa holders are not required to establish an intent to enter the United States for a specific period of time, nor are they required to maintain a foreign residence abroad. The E-1 and E-2 aliens are required, however, to depart the United States at the termination of the status.²³ Treaty aliens are admitted to the United States in increments of one year, which may be extended in increments of two-year periods by application to the INS.²⁴

To qualify employees for eligibility under the E classifications, the employee, as well as the employer, must possess the nationality of a country with an appropriate F.C.N. or B.I.T. treaty. There is no requirement for treaty alien employees that the employment existed outside the United States.²⁵

The State Department regulations prescribe that nationality for E visa purposes is based upon the nationality of fifty percent of the shareholders of a corporation, regardless of the place of incorporation.²⁶ A public company's nationality, where the actual percentage of nationality of ownership is difficult to ascertain, is presumed to be that of the country where the company's stock is listed and traded on

20. 54 Fed. Reg. 10,978, 10,979 (1989); 8 C.F.R. § 214.2(e)(2) (1990).

21. INA § 101(a)(15)(E)(ii); 8 U.S.C. § 1101(a)(15)(E)(ii) (1988).

22. 8 C.F.R. § 214.2(e); 9 U.S. DEPT. OF STATE FOREIGN AFFAIRS MANUAL [hereinafter F.A.M.], notes to 22 C.F.R. § 41.51 (1990).

23. 9 F.A.M., note 3.2 to 22 C.F.R. § 41.51 (1990).

24. 8 C.F.R. § 214.2(e) (1990).

25. 9 F.A.M., note 3.4 to 22 C.F.R. § 41.51 (1990).

26. *Id.* at note 3.1.

the stock exchange.²⁷

There is no requirement that the qualifying owners reside in the United States, but if they do reside in this country, it is required that they themselves maintain the E nonimmigrant status. A permanent resident alien owner cannot qualify the company's employees for E status. Likewise, the stock ownership of the permanent resident alien owner, regardless of the fact that the owner shares the qualifying nationality, may not be credited to satisfy the E visa nationality requirements.²⁸

1. E-2 Visa Eligibility and the Substantial Investment Requirement

As pointed out in the INS precedent decision, *In re Walsh and Pollard*,²⁹ the government established no minimum dollar figure for meeting the E-2 substantial investment requirement.³⁰ The State Department instead applies a proportionality test. The test measures the total value of the enterprise in the case of a purchase of an established business, or the amount normally considered necessary to establish a contemplated new enterprise.³¹

In small businesses, the treaty investor must put in a high percentage of the total investment. In a larger total investment, the treaty-investor may be required to invest a lower percentage.³² The test is subjectively applied in the U.S. consulates around the world: consular officers are required to use their knowledge of United States business to determine whether the amount the applicant has invested is reasonable for the particular type of business.³³

In *In re Walsh and Pollard*, IAD (UK) created IAD Corporation as a wholly owned subsidiary in Michigan. The Michigan Corporation rented an office, purchased office furniture, staffed the office with two British automotive design engineers and hired two United States citizen employees. The corporation had a bank account of ap-

27. Letter from Donald E. Parker, Chief, Written Inquiries Branch, Visa Services, Visa Office, State Dept. to Stuart I. Folinsky, Esq. (Nov. 21, 1988), *reprinted in* 66 INTERPRETER RELEASES 119 (Jan. 23, 1989); 1 C. GORDON & S. MAILMAN, IMMIGRATION LAW & PROCEDURE § 17.03(3)(b) (1990).

28. 9 F.A.M., note 3.4-1 to 22 C.F.R. § 41.51.

29. *In re Walsh and Pollard*, Interim Dec. No. 3111, at 11 (BIA 1988); 5 IMMIGR. L. & PROC. REPTR. B1-141 (1988).

30. *See supra* note 20.

31. 9 F.A.M., note 5.3-1 to 22 C.F.R. § 41.51.

32. *Id.* at note 5.3-3.

33. *Id.* at note 5.3-2.

proximately \$15,000. Although this investment was not large, the immigration judge and the Board of Immigration Appeals found that it was sufficient to establish the U.S. design company.³⁴ This service-oriented company did not require a large amount of capital to commence a viable business in light of its existing contract with General Motors to provide design services. Service enterprises need only acquire office space, office furniture, telephones and other amenities necessary to provide the services in question. If the investor invests one hundred percent of the amount of money necessary to establish such a business, then the proportionality test is clearly met.

In a recent Department of State telegram, the Visa Office changed the substantiality requirement for a small or medium sized business. The Visa Office stated that it is

. . . not absolutely necessary that all applicants establish that they have invested at least fifty per cent of the value of the business, as is currently stated in 22 CFR 41.51 N5.3-3. Rather, where it can be established that in a particular type of business the prevailing practice permits an investor to set up a viable business with less than a fifty percent investment, that fact ought to be taken into consideration when determining what is a substantial investment in a business of that type.³⁵

2. E-2 Visa Ownership and Control Requirements

The statute requires that the E-2 investor come to the U.S. to develop and direct the operation of the enterprise in which the investment was made. This requirement has been interpreted by the INS ensuring that the investor has sufficient ownership and control over the company that others will not be able to dictate how the business will be directed.³⁶

The State Department's policy for smaller companies is that if an investor has a fifty percent interest or less, he or she lacks the requisite control to meet the "develop and direct" requirement. The State Department's "develop and direct" policy also provides that an equal partnership does not usually provide the requisite controlling interest. In the case of corporate investment, the State Department's analysis relies "less on an arithmetical formula and more on corporate practice, since control of half or less of the stock" of a corporation may nevertheless provide effective control over the operations of a corporation.³⁷ Similarly, "[a] joint venture may also meet the 'develop and direct' requirement, provided that [the investor] can

34. *In re Walsh and Pollard*, Interim Dec. No. 3111 (BIA 1988); 5 IMMIGR. L. & PROC. REPTR. (MB) B1-141 (1988).

35. Telegram from the Department of State, *reprinted in* American Immigration Lawyer's Association, Monthly Mailing, 200 (March, 1990).

36. *In re Lee*, 15 I. & N. Dec. 187, 189-90 (Reg. Comm'r. 1975).

37. 9 F.A.M., note 5.5 to 22 C.F.R. § 41.51.

demonstrate that [he or she] has, in effect, operational control."³⁸

The State Department policy as to ownership was well set forth in *In re Walsh and Pollard*. State Department officials pointed out that although ownership is the most common vehicle to gain control of a business, it is not the only means to do so:

Yet, in view of the various modern creative business structures, the Department's view does not limit the satisfaction of this requirement solely to ownership. The particulars of each enterprise should be reviewed to determine whether by organizational or structural device the investor is in a position to 'develop and direct' [the business operations]. Among factors considered to assess 'controlling interest' are ownership, control of stock by proxy, [management] position and authority, etc.³⁹

Franchise businesses have become a popular form of E-2 investment. However, care should be taken to insure that the terms of the franchise agreement permit the franchise recipient sufficient control over the business to satisfy the "develop and direct" requirement.⁴⁰

B. Qualifying Employees: E Visa Executives, Supervisors, And Personnel With Essential Skills

Treaty trader and investor companies may qualify their executive or supervisory employees who perform managerial functions, and those employees who provide essential skills or services, for E classification.⁴¹ Department of State regulations admit the latter category of employees whose special qualifications make their services essential to the efficient operation of the enterprise. Essential skilled workers include highly trained technicians who are able to train or supervise personnel employed in manufacturing, maintenance, and repair functions. They themselves may perform incidental manual functions.⁴²

Consular officers will usually exercise wide discretion in issuing visas to applicants who claim essential skills and services. The officer may attempt to determine whether or not the applicant's skills qualify as those essential to the effectiveness of the U.S. operations. Factors to be taken into account include the following:

38. *Id.*

39. Interrogatories in *In re Walsh and Pollard*, Visa Office Response to Applicant's Written Interrogatories, ** IMMIGR. L. & PROC. REPTR. (MB) A3-136, A3-159 (BIA 1988).

40. *In re Kung*, 17 I. & N. Dec. 260, 263-64 (Comm'r. 1978).

41. 9 F.A.M., notes 3.4-2, 3.4-3 to 22 C.F.R. § 41.51.

42. *Id.* note 4.3-3; See also *In re Walsh and Pollard*, Interim Dec. No. 3111, 5 IMMIGR. L. & PROC. REPTR. (MB) B1-141 (BIA 1988) (automotive design engineers allowed to enter as E-2 aliens in order to redesign General Motor's automobiles).

1. Proven expertise in the area of specialization;
 2. Uniqueness of the skills;
 3. Length of experience and training with the firm;
 4. Period of training needed to learn to perform the U.S. duties;
- and
5. Salary level.⁴³

Some latitude will be given to start-up E-2 companies during the early stage of the investment. They will be afforded E-2 status for employees whose mere familiarity with the foreign company's overseas operations makes them essential during this initial period of time. This class of employees will usually be afforded an authorization for a one-year period.⁴⁴

Visa officers are instructed to presume that the company will train replacement U.S. workers within a reasonable time, both in the case of employees coming to start up an E-2 investment as well as when highly trained technicians come to E-1 or E-2 companies. The absence of an effective training program is considered by the State Department to be a negative factor in the assessment of the company's future employee visa applications.⁴⁵

Consular officers are instructed to consider conditions in the domestic labor market as well. The officers may ask the company to provide statements from such organizations as chambers of commerce, organized labor groups, industry services organizations, or state employment services groups as to the unavailability of U.S. workers to provide these services.⁴⁶

II. L VISAS

A. L-1 Intracompany Transferees

In the absence of an E-1 or E-2 treaty, the L-1 nonimmigrant visa is the best method to efficiently transfer company managers, executives, and specialized knowledge personnel to the United States. Intracompany transferees must have been continuously employed abroad by the "qualified firm or corporation or other legal entity or an affiliate or subsidiary thereof" for one year preceding his or her application for admission to the United States. The 1990 Act amends the employment abroad requirement to allow the qualifying year of employment abroad to have occurred within the three years preceding the L-1 petition.⁴⁷ The proposed employment must be in a

43. 9 F.A.M., note 3.4-3(a) to 22 C.F.R. § 41.51.

44. *Id.* at note 3.4-3(b).

45. *Id.* at note 3.4-3(d).

46. *Id.* at note 3.4-3(e).

47. 1990 Act, *supra* note 11, § 206(c), (amending INA § 101(a)(15)(L); to be codified at 8 U.S.C. § 1101(a)(15)(L)).

managerial or executive capacity or require that the alien have specialized knowledge.⁴⁸

The length of time for which an L visa will be granted depends partly on the status of the company. If the L-1 intracompany transferee is entering the United States to start up a new office, the initial admission will be limited to one year; an extension may be granted if the company business grows to a level that satisfies the strict extended stay requirements for qualifying executive or management positions.⁴⁹ If the L-1 alien is coming to an established company, the initial period of petition validity may be three years. Under the 1990 Act there is a five year ceiling on L-1 employment for aliens admitted on the basis of specialized knowledge,⁵⁰ and a seven year ceiling for aliens admitted to perform duties in a managerial or executive capacity.⁵¹ The Service's previous regulations had provided for an additional (sixth) year beyond the five-year cap where termination of the L-1 status would impose an extreme hardship on the employer or where the services were necessary for the national welfare, safety, or security.⁵² Due to the changes in the 1990 Act, the INS has indicated that it will grant sixth year L-1 executive and manager extensions to current guidelines without the necessity of the petitioner meeting the previous regulatory standard of "extraordinary circumstances."⁵³

A start-up L-1 company in the United States does not have to be in full operation before transferees will be admitted. However, the INS requires that a lease for the premises, as well as other proof of the petitioner's intent to start up the business, be submitted with the nonimmigrant visa petition.⁵⁴ Moreover, employers are authorized under the 1990 Act to file a blanket petition to preapprove the company's organizational qualifications, thus simplifying the process of bringing individual transferees to the U.S.⁵⁵

48. INA § 101(a)(15)(L); 8 U.S.C. § 1101(a)(15)(L) (1988).

49. 8 C.F.R. § 214.2(l)(7)(A)(3) (1990).

50. 1990 Act, *supra* note 11, at § 206(b) (adding § 214(c)(2)(D)(ii) to the INA, to be codified at 8 U.S.C. § 1184(c)(2)(D)(ii)).

51. *Id.* at § 206(b) (adding § 214(c)(2)(D)(i) to the INA, to be codified at 8 U.S.C. § 1184(c)(2)(D)(i)).

52. 8 C.F.R. § 214.2(l)(15) (1990).

53. Schmidt, *Overview of the Immigration Act of 1990*, in UNDERSTANDING THE IMMIGRATION ACT OF 1990 14 (P. Schmidt ed. 1990) (citing INS operations cable IMM Act 90 Wire No. 10, at 11-13 (Dec. 5, 1990)).

54. 8 C.F.R. § 214.2(l)(3)(v).

55. 1990 Act, *supra* note 11, § 206(b) (amending INA § 214(c), to be codified at 8 U.S.C. § 1184(c)).

B. Qualifying L-1 Business Structures

INS regulations require that the petitioner qualify as a United States or foreign firm, corporation, or other entity such as a parent company, affiliate, or subsidiary. The qualifying organization must be doing business as an employer in the United States and in at least one other country.⁵⁶

The INS defines a subsidiary as a

firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, 50% of a 50-50 joint venture and has equal control and veto power; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.⁵⁷

All bona fide forms of business organization, including sole proprietorships and partnership, have been held to qualify as a "firm or legal entity" under the statute.⁵⁸

The INS has also recognized that the major shareholder of a properly formed and operated corporation may qualify as an L-1 transferee. The 1990 regulations require that if the transferee is also a major shareholder or owner of the petitioning company, proof be provided that the L-1 alien will be transferred out of the United States at the end of the authorized stay.⁵⁹

A qualifying affiliate relationship will be found between two subsidiaries owned by the same individual or parent company. The INS regulation also favorably contemplates the situation where the affiliates are owned and controlled by the same group of individuals, with each individual owning and controlling approximately the same share or portion of each entity.⁶⁰

The 1990 Act provides a liberalized affiliation definition specifically for transfers within international accounting organizations. The provision recognizes affiliation between separately owned accounting firms who market accounting services under a recognized name using a coordinated international organization owned and controlled by member firms.⁶¹

C. Joint Ventures And De facto Control For L-1 Visas

In a decision that preceded the 1987 L-1 regulations, the INS applied the concept of negative control to find that a fifty- fifty joint venture could be both a subsidiary of the parent company and an

56. 8 C.F.R. § 214.2(l)(1)(ii)(G).

57. *Id.* § 214.2(l)(1)(ii)(K).

58. *Johnson-Laird, Inc. v. INS*, 537 F. Supp. 52, 54 (D. Ore. 1981); 52 Fed. Reg. 5741 (1987).

59. 8 C.F.R. § 214.2 (l)(3)(vi) (1990).

60. *Id.* § 214.2(l)(1)(ii)(L).

61. 1990 Act, *supra* note 11, at § 206(a).

affiliate of the United States petitioner.

In *In re Siemens Medical Systems, Inc.*,⁶² the petitioner was the United States wholly-owned subsidiary of the German MNC, Siemens AG. The German parent company had employed the beneficiary abroad in a Jordanian fifty-fifty joint venture with the Dutch electronics MNC, Phillips International. The INS Administrative Appeals Unit (A.A.U.) held that a fifty-fifty joint venture constituted an affiliate relationship that qualified the beneficiary's employment for the immediately preceding year and also satisfied the L-1 ownership and control requirements.

The A.A.U. found that although there was not majority control, there was negative control where each of the fifty percent owners had the power to prevent action by the joint venture through exercise of its veto power. Siemens AG not only had *de facto* control of the joint venture, it jointly managed the joint venture, shared equally in the profits, and manufactured the equipment sold and installed by the joint venture. The INS sustained the appeal finding that the joint venture was a subsidiary of the parent and an affiliate of the petitioner.

D. *Qualified Employees*

1. *L-1 Executives And Managers*

In the 1987 amendments to the L-1 regulations, the INS made controversial changes to the definitions of "executive" and "manager", thereby making it difficult for small companies to use this visa classification for potential transferees.⁶³ The 1990 Act is significant because it gives statutory definitions to the terms "managerial capacity" and "executive capacity" for the first time.⁶⁴ The new definitions are substantially similar to the regulatory definitions.

Under the 1987 regulatory definition of "manager," he or she must be coming to an assignment in the United States to:

62. 3 IMMIG. L. & PROC. REP. (MB) B2-81 (Comm'r. 1986) [hereinafter *Siemens*].

63. 8 C.F.R. § 214.2(1)(1)(ii)(B)(C) (1990); final rule published in 52 Fed. Reg. 5738 (1987). See Schwartz, *The Changing Definitions of "Executive" and "Manager" for L-1 and Schedule A, Group IV Purposes*, in 1990 HIRING FOREIGN PERSONNEL: IMMIGRATION PROBLEMS AND SOLUTIONS 43 (AILA, 1990); *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988); but see *Fedin Brothers Co. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989); *Nat'l Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 (5th Cir. 1989).

64. 1990 Act, *supra* note 11, at § 123 (adding §§ 101(a) (44)(A) and (B) to the INA, to be codified at 8 U.S.C. § 1101(a)(44)(A) and (B)).

1) Primarily direct the organization or its department or subdivision;

2) Supervise and control the work of other supervisory professional or managerial employees;

3) Possess the authority or the ability to recommend personnel actions including:

(a) hiring and firing;

(b) promotions and leave;

4) Exercise discretionary authority over day-to-day operations.⁶⁵

In one significant change, the 1990 Act allows managerial status even if the transferee does not “directly supervis[e] other employees,” as long as the alien “functions at a senior level within the organizational hierarchy or with respect to the function managed.”⁶⁶ Both the statutory and the regulatory definitions of manager specifically exclude a first-line supervisor, unless the supervised employees are professional.⁶⁷

The 1990 Act provides for the transfer of an executive in a fashion similar to the 1987 regulation. Under this definition, an executive may be transferred to an assignment where he or she:

1. Primarily directs the management of the organization or its major component or function;

2. Establishes its goals and policies;

3. Has the latitude to make discretionary decisions;

4. Receives only general supervision from higher level executives, the board of directors, or the stockholders.⁶⁸

The 1987 regulation carved out a “hands on” exception for managers and executives who come to the United States to establish a new office because it is expected they may have to involve themselves in production activities during the initial start-up year.⁶⁹ The expected L-1 regulations under the 1990 Act may also recognize this need for direct involvement in the production process during the start-up phase of a business.

The INS has held that for intracompany transferee purposes (that is, for L-1 as well as for Schedule A Group IV blanket labor certification),⁷⁰ a company’s president and only salaried employee may

65. 8 C.F.R. § 214.2(l)(1)(ii)(B) (1990); 1990 Act, *supra* note 11, at § 123 (adding § 101(a)(44)(A) to the INA, to be codified at 8 U.S.C. § 1101(a)(44)(A)).

66. 1990 Act, *supra* note 11, at § 123 (adding § 101(a)(44)(A)(iv) to the INA, to be codified at 8 U.S.C. § 1101(a)(44)(A)(iv)).

67. *Id.* at § 123 (adding § 101(a)(44)(A) to the INA, to be codified at 8 U.S.C. § 1101(a)(44)(A)). 8 C.F.R. § 214.2(l)(1)(ii)(B) (1990).

68. 8 C.F.R. § 214.2(l)(1)(ii)(C) (1990); 1990 Act, *supra* note 11, at § 123 (adding § 101(a)(44)(B) to the INA, to be codified at 8 U.S.C. § 1101(a)(44)(B)).

69. 8 C.F.R. §§ 214.2(l)(7)(A)(3), (14)(ii), (3)(V)(C) (1990).

70. 20 C.F.R. § 656.10(d)(1990). By this regulation the Department of Labor has made a blanket determination that alien employment in certain occupations will not adversely affect the U.S. labor force. Visa petitions claiming the benefits of this regulation

qualify as an executive. In *In re Irish Dairy Board, Inc.*, the company had engaged in a substantial import and export business with 1987 gross profits of \$40 million.⁷¹ The A.A.U. found that a sole employee may be classified as an executive, provided his or her primary function is to plan, organize, direct, and control the organization using other service providers.

In *In re Irish Dairy Board, Inc.*, the A.A.U. found that the regulations did not limit the designation of a company's "employees" to persons on the payroll. The Irish Dairy Board had hired Price Waterhouse to perform accounting functions and an independent contractor in Wisconsin handled the storage duties. Other independent contractors handled the freight forwarding and customs work. In sustaining the appeal, the A.A.U. found it dispositive that independent contractors rather than the executive were performing the day-to-day business tasks of the company. The A.A.U. also found it significant that the president was directing the company with little or no supervision from the company's board of directors in Ireland.⁷²

2. L-1 Specialized Knowledge Personnel

The L-1 statute allows a petitioner to transfer employees with specialized knowledge to the United States. Under the 1990 Act, "an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company."⁷³ The INS interpretations of the 1987 regulatory guidelines contemplated an individual with an advanced level of expertise and proprietary knowledge of the employer's products, service, research, equipment, techniques, management, or other interests not readily available in the United States labor market. While the INS did not require that the knowledge be unique or narrowly held,⁷⁴ it barred from L-1 classification those employees who it found to have merely "general knowledge or expertise" in the product or service of the employer.⁷⁵ The specialized

are resubmitted directly to the INS.

71. File A28 845 421 (A.A.U., Nov. 16, 1989), reported in 66 INTERPRETER RELEASES 1329 (Dec. 4, 1989).

72. *Id.*

73. 1990 Act, *supra* note 11, at § 206(b) (adding § 214(c)(2)(B) to the INA, to be codified at 8 U.S.C. § 1184(c)(2)(B)).

74. 8 C.F.R. § 214.2(l)(ii)(D) (1990).

75. Memorandum from R. Norton, INS Assoc. Commissioner, regarding interpre-

knowledge definition in § 206 of the 1990 Act provides a liberalization from the days when only those employees with proprietary knowledge of exclusive company processes could be transferred to the United States.

III. H. VISAS

A. *H-1B Visas: A Category in Transition*

Companies that cannot qualify their employees for either E or L categories will need to explore other nonimmigrant visa possibilities in order to hire foreign workers with the combination of proven expertise, unique skills, and experience they need. The 1990 Act made more significant changes to the H category visa than to any other nonimmigrant visa.⁷⁶ These changes followed other extensive revisions to this category which were promulgated by the Immigration Nursing Relief Act of 1989 (INRA)⁷⁷ and new regulations put forth by the INS in 1990.⁷⁸

The regulatory definitions and requirements apply before October 1, 1991, and the 1990 Act applies after that date.⁷⁹ The regulations allowed persons of distinguished merit and ability, notably professionals, as well as aliens of prominence, notably professional athletes and entertainers, to enter as H-1B aliens. The 1990 Act, in contrast, creates new categories of nonimmigrant visas. The new categories cover persons of extraordinary ability in the arts and sciences as well as business persons, entertainers, and athletes ("O" Visas), and persons of "internationally recognized" levels of achievement in athletics or entertainment ("P" Visas). The 1990 act eliminates the prominence standard.⁸⁰ Finally, the 1990 Act specifically prohibits aliens who qualify under the new categories from entering under H-1B visas.⁸¹

B. *Pre-1990 Act*

1. *H-1B Visas for Aliens of Distinguished Merit and Ability*

H-1B temporary visas are available, until October 1, 1991, to non-immigrant aliens of distinguished merit and ability who come to the United States to perform services of an exceptional nature requiring such merit and ability. The INS definition of distinguished merit and

tation of specialized knowledge under the L classification, *reprinted in* 65 INTERPRETER RELEASES 1194 (Nov. 7, 1988).

76. 1990 Act, *supra* note 11, at § 205.

77. Pub. L. No. 101-238, 103 Stat. 2099.

78. 55 Fed. Reg. 2606 (1990).

79. 1990 Act, *supra* note 11, at § 161.

80. *Id.* at § 207.

81. *Id.* at § 205.

ability has been limited to members of the professions or persons who are prominent or renowned in their fields of endeavor. According to the statute, "the term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies or seminaries."⁸²

Under the regulations, the H-1B alien is limited to five years of employment with a sixth year possible only under "extraordinary circumstances."⁸³ The E-1 or E-2 nonimmigrant, in contrast, does not have a ceiling on the total amount of authorized time he or she may remain in the United States.

The regulations covering the criteria to qualify as members of the professions and prominent aliens were revised by the INS in a final rule which became effective February 26, 1990.⁸⁴ According to the regulations, an occupation is a profession when a bachelor's degree in the field from an accredited United States college or university is a prerequisite for entry into the occupation in the United States.⁸⁵

The 1990 H-1B regulations designate members of the professions as:

- Persons who possess a foreign degree determined to be the equivalent of a United States bachelors degree, or higher degree required to enter the profession; or
- Persons who possess an unrestricted state license which authorizes immediate practice of the profession in the state of intended employment; or
- Persons who possess a combination of education, specialized training and/or professional experience that is the *equivalent to the training acquired by the attainment of a college degree*.⁸⁶

The regulations provide for such traditional methods of determining college degree equivalency as evaluations for college officials, approved examinations, evaluation by foreign credential equivalence

82. INA § 101(a)(32); 8 U.S.C. § 1101(a)(32)(1988).

83. 8 C.F.R. § 214.2(h)(13)(ii) (1990). The 1990 Act allows H-1B aliens a total of six years of employment. 1990 Act, *supra* note 11, at § 205 (adding § 214(g) to the INA, to be codified at 8 U.S.C. § 1184(g)(4)).

84. 55 Fed. Reg. 2606 (1990). The INS subsequently published an interim rule at 55 Fed. Reg. 34,895 (1990) implementing the Immigration Nursing Relief Act of 1989 (INRA), Pub. Law No. 101-238. This interim rule, effective September 1, 1990, amended 8 C.F.R. § 214.2(h) to reflect the new H-1A nonimmigrant classification for professional nurses and the H-1B classification for professional and prominent aliens. The references to the C.F.R. in this Article reflect that change.

85. 55 Fed. Reg. 2606 (1990) (to be codified at 8 C.F.R. § 214.2(h)(4)(ii)(A)). This regulatory definition of a profession follows *In re Caron Industries, Inc.*, Interim Dec. No. 3085 (Comm'r. 1988).

86. 55 Fed. Reg. 2606 (1990 (to be codified at 8 C.F.R. § 214.2(h)(4)(iii)(B)).

services, and recognition by appropriate professional societies.⁸⁷ An innovative feature of the H-1B regulations allows the INS to determine equivalence of experience to a professional degree. This determination requires a demonstration that the applicant possesses three years of specialized training and progressively responsible work experience in areas related to the profession for each year of college-level training the alien lacks.⁸⁸

The successful H-1B application will also contain the employer's proof that the position offered to the foreign applicant requires that the incumbent be a member of the professions.⁸⁹

2. *H-1B Aliens of Prominence*

Foreigners who are prominent or renowned are also classified as H-1B aliens of distinguished merit and ability.⁹⁰ The regulations define prominence broadly to encompass a high level of achievement in a field as evidenced by a degree of skill and recognition substantially above that ordinarily encountered.⁹¹ The INS considers an applicant prominent if he or she has received national or international acclaim and recognition for achievements in the field of endeavor.⁹² Well-known artists, entertainers, models, and sports figures are examples of prominent foreigners who have been accorded H-1B status.

In the 1990 regulations, the service proposed a new test of prominence for persons who have exceptional career achievement in business, executive, managerial, or highly technical positions. These H-1B temporary workers must prove to the satisfaction of the INS that three of the following factors exist:

1. Managerial responsibility for an organization or its major subdivision which has a gross annual income of at least ten million dollars;
2. At least ten (10) years of progressively responsible experience, culminating in a high level executive, managerial, or technical position with commensurate responsibilities;
3. A minimum salary of \$75,000 per year;
4. Responsibility for a work force which includes a significant number of professional, supervisory, or other managerial employees;
5. Original development of a system or product with significance to the industry as reported in publications or opinions of recognized experts in the field; or
6. Recognition for achievements and significant contributions to the industry or field by recognized experts in the field.⁹³

87. *Id.* (to be codified at 8 C.F.R. § 214.2(h)(4)(iii)(C)).

88. *Id.* (to be codified at 8 C.F.R. § 214.2(h)(4)(iii)(C)(5)).

89. 8 C.F.R. § 214.2(h)(4)(iii)(A) (1990).

90. *In re Shaw*, 11 I & N Dec. 277 (D.D. 1965).

91. 55 Fed. Reg. 2611 (1990).

92. 55 Fed. Reg. 2624 (to be codified at 8 C.F.R. § 214.2(h)(4)(iv)).

93. 55 Fed. Reg. 2625 (to be codified at 8 C.F.R. § 214.2(h)(4)(iv)(B)(3)).

C. 1990 Act

1. H-1B Visas For Aliens In "Speciality Occupations"

After October 1, 1991, the H-1B visa petition process may be more cumbersome and more intrusive, and thus less attractive, to employers seeking either to transfer foreign employees to the United States or to hire alien employees to work in the United States. The 1990 Act not only provides for numerical limits on the number of such visas issuable⁹⁴ but also imposes a Department of Labor attestation procedure.⁹⁵

Under the 1990 Act, an employer may transfer employees to perform services in a "specialty occupation." A specialty occupation is defined as one which requires a "theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."⁹⁶ The alien may meet the requirements of qualification to perform a specialty occupation in one of three ways. These are:

- 1) full state licensure (if state licensure is required to perform the specialty occupation);
- 2) completion of a degree; or
- 3) experience equivalent to a degree and "recognition of expertise in the specialty through progressively responsible positions relating to the specialty."⁹⁷

It is expected that prospective U.S. employers will also have concerns regarding the new H-1B labor attestation procedures. As yet there have been no regulations promulgated detailing how the procedure is to be implemented. The statute does require an employer to file an attestation with the Department of Labor affirming that (1) the alien employee, and all other employees in that occupation, will be paid the actual or prevailing wage and that the working conditions for the other workers will not be adversely affected; and (2) there are no strikes or lockouts involving that occupation in the place

94. 1990 Act, *supra* note 11, at § 205 (adding § 214(g) to the INA, to be codified at 8 U.S.C. § 1184(g)).

95. *Id.* at § 205(c)(3) (adding § 212(n) to the INA, to be codified at 8 U.S.C. § 1182(n)).

96. *Id.* at § 205(c)(2) (adding § 214(i) to the INA, to be codified at 8 U.S.C. § 1184(i)).

97. *Id.* at § 205(c)(2) (adding § 214(i) to the INA, to be codified at 8 U.S.C. § 1184(i)).

of employment; (3) that the employer gave notice to the bargaining representative, if any, or posted notice in the workplace. The application must also specify all the details regarding the number of employees sought, the wage rate and working conditions, and the occupation.⁹⁸

It is unclear whether challenges, if any, to the visa issuance are to be made post-entry of the H-1B alien, or whether the H-1B visa petition would be approved only after challenges have been settled favorably for the employer.⁹⁹ However, the promise to pay the prevailing wage and the notice procedure will undoubtedly have a chilling effect on some prospective employers.

Congress did benefit H-1B visa applicants in other ways. The 1990 Act removed the requirement for an H-1B visa holder to maintain a residence abroad.¹⁰⁰ Moreover, Congress made it clear that applying for permanent residence in the United States would not "constitute evidence of an intention to abandon a foreign residence" for purposes of obtaining an H-1 or L visa after October 1, 1991.¹⁰¹

D. The H-2B Temporary Worker Category: The Last Resort

Employers who wish to fill temporary positions that do not require either a member of the professions or a person who is prominent in a field of endeavor will need to survey the rather dismal landscape of the H-2B nonimmigrant visa classification. The H-2B category includes persons coming temporarily to the United States to perform a temporary service when persons capable of performing such labor cannot be found in the United States.¹⁰²

The initial application for an H-2B visa must be made to the local office of the state employment service nearest the proposed place of employment. The H-2B regulations require that the employer test the labor market to demonstrate a shortage of qualified United

98. *Id.* at § 205(c)(3) (adding § 212(n)(1) to the INA, to be codified at 8 U.S.C. § 1182(n)(1)).

99. The 1990 Act, *supra* note 11, at § 205(c)(3) states that "no alien may be admitted . . . unless the employer has filed [an application] with the Secretary of Labor." That language suggests that a simple filing with no review or challenge procedure is sufficient for entry. However, the Act earlier states that an alien must meet the occupational requirements and the Secretary of Labor must "determine[] and certif[y] to the Attorney General that the intending employer has filed with, and had approved by, the Secretary" its labor application. *Id.* at § 205(c)(1). That language suggests that granting the H-1B visa must follow resolution of potential challenges.

100. *Id.* at § 205(b)(1) (amending INA § 214, to be codified at 8 U.S.C. § 1184).

101. *Id.* at § 205(b)(2) (adding § 214(h) to the INA, to be codified at 8 U.S.C. § 1184(h)).

102. INA § 101(a)(15)(H)(ii)(b); 8 U.S.C. § 1101(a)(15)(H)(ii)(b)(1988). The 1990 Act places a cap on the number of H-2B visas issuable in a year. 1990 Act, *supra* note 11, at § 205(a) (adding § 214(g)(1)(B) to the INA, to be codified at 8 U.S.C. § 1184(g)(1)(B)).

States workers for the temporary position in order to obtain a temporary labor certification.¹⁰³ However, once the Department of Labor's recommendation regarding the certification is made, favorable or unfavorable, it is not binding on the INS. The employer has the right to present countervailing evidence to the INS to demonstrate that qualified U.S. workers are not available.¹⁰⁴

The INS also requires that the employer prove that the duties to be performed by the employee are temporary, whether or not the underlying job is described as permanent or temporary.¹⁰⁵ The INS will determine whether or not the job is temporary by looking at the nature of the employer's need rather than at the nature of the duties.¹⁰⁶ The employer's need must be shown to be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.¹⁰⁷ The INS general rule is that the employer's need for H-2B workers must not exceed one year. The agency does acknowledge that extraordinary circumstances may exist where the services are needed for longer than one year.¹⁰⁸

The noted attorney and author, Stanley Mailman, best summed up the immigration bar's feelings about the H-2B category in a recent roundtable discussion about business visa strategy: "I just feel so negatively about H-2's I don't even want to hear about them. You put in months of work with the Department of Labor and the INS to get a measly year - assuming that you qualify in terms of the temporariness of the job."¹⁰⁹

IV. CONCLUSION

Cross-border direct investment in the United States through a foreign company's acquisition of a domestic business necessitates careful immigration planning. High on the investor's list of priorities may well be the need to quickly and efficiently transfer foreign personnel with needed management experience and high technology skills to the newly acquired U.S. company. The investor may also wish to employ foreign graduates of United States colleges and universities who have needed education and skills. In addition to these

103. 8 C.F.R. § 214.2(h)(6) (1990).

104. *Id.* § 214.2(h)(6)(iv)(D)-(E).

105. *Id.* § 214.2(h)(6)(ii).

106. *Id.* § 214.2(h)(6); *In re Artee Corp.*, 18 I & N Dec. 366 (Comm'r. 1982).

107. 8 C.F.R. § 214.2(h)(6)(ii)(B) (1990).

108. *Id.* § 214.2(h)(6)(ii)(B).

109. D. Buffenstein, C. Foster, S. Mailman & A. Paparelli, *Advanced Business Visa Strategy Roundtable*, 89-9 IMMIG. BRIEFINGS at 19 (Sept. 1989).

issues, the investor may acquire a U.S. work force and be placed in the role of a successor-in-interest employer. As in the case of all employers in the United States, the investor will be responsible for compliance with the IRCA employer sanctions provisions. Each of these issues is governed by a complex web of federal statutes and regulations. The foreign investor quickly learns that an effective immigration strategy is necessary in order to successfully do business in the United States.